Supreme Court, U.S.
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No. 91-2069

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED AIRLINES, INC.,
Petitioner,

v.

PAUL HART, DANE VANNICE, and MILTON HOWARD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR PETITIONER

ROBERT A. SIEGEL
(Counsel of Record)
O'MELVENY & MYERS
400 South Hope Street
Los Angeles, CA 90071
(213) 669-6000

JEFFREY I. KOHN
O'MELVENY & MYERS
153 East 53rd Street
New York, N.Y. 10022
(212) 326-2000

KRIS J. KOSTOLANSKY
ROTHGERBER, APPEL, POWERS & JOHNSON
Suite 3000
One Tabor Center
1200 Seventeenth Street
Denver, CO 80202
(303) 623-9000

Attorneys for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF FOR PETITIONER

United Airlines, Inc.* hereby submits this Reply Memorandum in support of its Petition to this Court for issuance of a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on February 13, 1992.

ARGUMENT

I. THE ISSUES PRESENTED FOR REVIEW ARE NOT "ABOUT TO GO AWAY", AS RESPONDENTS CONTEND, NOR ARE THE ISSUES "NOT PROPERLY PRESENTED HERE"

Respondents contend that the "principal reason" why this Court should not grant certiorari "is that the [statute of limitations] issue is about to go away." (Resp. Brf. at 4.) As Respondents acknowledge, however, airline industry employees may exercise their first-hire

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* As required by Rule 29.1 of this Court, petitioner has listed its parent companies, subsidiaries and affiliates in its Petition for Writ of Certiorari.

rights under Section 43(d) of the Airline Deregulation Act, 49 U.S.C. App. § 1552(d) (1988), until October 24, *1994*—hardly a situation that "is about to go away." Moreover, employees who contend their Section 43 rights have been violated may, depending on the appropriate limitations rule and when their claims accrue, challenge an air carrier's failure to hire them well *after* October 24, 1994. Thus, Federal courts will continue to struggle with the question raised in this Petition.

Respondents also speculate that Congress "might address the limitations issue in the [pending] legislation." (Resp. Brf. at 5.) However, none of the bills pending in Congress to expand the class of employees subject to first-hire rights under Section 43(d) addresses the statute of limitations issue. H.R. 3171, 102d Cong., 1st Sess. (1991); S. 1565, 102d Cong., 1st Sess. (1991).[1]

Respondents next contend that the issue of the appropriate statute of limitations applicable to Section 43(d) may not have been properly before the court of appeals, even though Respondents raised the issue to the court of appeals and the Tenth Circuit ruled on this issue. Respondents are incorrect since the district court, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, entered an order of *final* judgment as to all three Respondents (1a-2a).[2] Upon appeal of a final judgment, an

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[1] The Judicial Improvements Act of 1990 ("JIA") is also inapplicable to these bills. (Resp. Brf. at 5.) The JIA applies a uniform four-year federal statute of limitations to "a civil action arising under an Act of Congress *enacted after* [December 1, 1990]." 18 U.S.C. § 1658 (emphasis added). Section 43(d), however, was enacted by Congress in *1978*; the bills pending before Congress only purport to expand the class of employees who can bring a civil action under Section 43(d).

[2] On January 31, 1992, the district court entered an order of final judgment in favor of United and against Hart, Howard, and Vannice (1a). On February 6, 1992, the district court entered a judgment of dismissal on Respondents' claim (3a). Citations to material printed in the annexed appendix appear as "——a".

appellate court has jurisdiction under 28 U.S.C. § 1291 to hear any of the district court's rulings. Even rulings that are interlocutory in nature are merged into the final judgment. *Matter of Xonics, Inc.*, 813 F.2d 127, 130-131 (7th Cir. 1987); *Elfman Motors v. Chrysler Corp.*, 567 F.2d 1252, 1253 (3d Cir. 1977); *Hellerstein v. Mr. Steak, Inc.*, 531 F.2d 470, 474 (10th Cir.), *cert. denied*, 429 U.S. 823 (1976).[3] As to Respondent Vannice, the statute of limitations ruling, while interlocutory in nature, became reviewable upon entry of a final judgment against him.[4]

In short, the court of appeals had jurisdiction to decide the statute of limitations issue.

II. RESPONDENTS MISUNDERSTAND UNITED'S ARGUMENT ABOUT THE CONFLICT BETWEEN THE TENTH CIRCUIT'S DECISION AND DECISIONS OF THIS COURT

Respondents completely mischaracterized United's argument that the Tenth Circuit misapplied the set of inquiries formulated by this Court for ascertaining whether state or federal borrowing is more appropriate. United does not contend, as Respondents claim, that the issue is "whether uniformity of time period is desirable." (Resp.

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[3] The district court also certified its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (2a). Therefore, even assuming there was no final judgment, the court of appeals accepted the district court's certification of the issue under 28 U.S.C. § 1292(b) when it decided the statute of limitations question.

[4] But if Respondents are *correct* that the Tenth Circuit did *not* have jurisdiction to decide the issue of the applicable statute of limitations, even though it was Respondents who first raised and briefed the issue to the court of appeals, then under their theory this Court should *vacate* that portion of the Tenth Circuit's opinion addressed to the statute of limitations. *See Liberty Mutual Insurance v. Wetzel*, 424 U.S. 737, 740 (1976). In *Liberty Mutual*, this Court, on its own motion, held that the court of appeals did not have jurisdiction over an interlocutory appeal and vacated the judgment of the court of appeals. *Id.* at 746.

Brf. at 8.) Rather, as United demonstrated in its Petition, the threshold inquiry is whether a uniform characterization of a federal statute better promotes the *federal interests* in predictability, judicial economy, and best fits the statute's remedial purpose. (Pet. at 18.) Contrary to the Tenth Circuit's view, this Court has *never* suggested that only federal causes of action involving diverse factual circumstances should be characterized uniformly for borrowing purposes. (Pet. at 18.) Respondents' confusion over the proper analysis demonstrates why Supreme Court intervention is necessary here.

Respondents also contend that if federal law is the appropriate source for borrowing, other federal laws should be borrowed. (Resp. Brf. at 9-10.) Respondents suggest the two-year limitations rule under the Railway Labor Act ("RLA"), 45 U.S.C. § 153, First (r). That limitations rule applies only to a petition to the district court to review an order of an RLA Adjustment Board. *Id.* Such claims are not even marginally analogous to a Section 43 claim. *Id.*[5] Respondents also offer the two-year limitations period under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. 621 *et seq*—a limitations rule that was deleted from the ADEA as of November 21, 1991 by the 1991 Civil Rights Act. Pub. L. No. 102-166 § 115, 105 Stat. 1071, 1079 (codified as amended at 29 U.S.C § 626(e) (Supp. 1992)). Moreover, in order to preserve an ADEA claim an employee must *first* file a charge of employment discrimination within 180 days (or 300 days in a deferral state) after the alleged employment practice occurred. 29 U.S.C. § 626(d)(1) (1988). If the ADEA is a more appropriate borrow-

[5] The more analogous claim under the RLA, which Respondents ignore, is a claim for wrongful discharge for protected union activity. 45 U.S.C. § 152, Fourth. For such claims courts have applied a six-month statute of limitations, borrowed from Section 10(b) of the National Labor Relations Act. *See Robinson v. Pan American World Airways*, 777 F.2d 84, 89 (2d Cir. 1985).

ing source, the 180-day statute of limitations should be applied.

This Court should grant review to resolve the confusion in the Circuits and to assure that its borrowing rules are applied correctly by the federal courts.

III. THE TENTH CIRCUIT'S TEST FOR BORROWING A STATE LIMITATIONS RULE IS CONTRARY TO SUPREME COURT PRECEDENT

Respondents ignore United's argument that the court of appeals, in mechanically borrowing a state residual limitations period for "all actions upon liability created by a federal statute," Colo. Rev. Stat. § 13-80-102(1)(g), disregarded the fundamental state-law borrowing principles of this Court which require federal courts to borrow the limitations rule for the most analogous state *cause of action* similar to the federal cause of action at issue. *See Campbell v. Haverhill*, 155 U.S. 610, 617 (1895); *see also Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985). The court of appeals neither examined the essential nature of a Section 43 claim nor explained why a Colorado residual statute is somehow the most analogous state limitation period.

Respondents contend that it is appropriate for a federal court to borrow a state residual limitations period for a federal statute, and rely on three federal court cases which do so. (Resp. Brf. at 10-11.) These cases—adopting a state residual limitations period for causes of action under § 301 of the Labor Management Relations Act ("LMRA"),[6] 42 U.S.C. § 1987, and § 303 of the LMRA[7]—have either been overruled or have been called into question by other circuits. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 662 (1987) (for claims under *42 U.S.C. § 1981*, this Court applied state limitations

[6] 29 U.S.C. § 185.

[7] 29 U.S.C. § 187.

period governing *personal injury* actions); *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 165 (1983) (for claims under LMRA § 301, this Court applied the six-month *federal* statute of limitations contained in the LMRA); *Carruthers Ready-Mix v. Cement Masons Local Union*, 779 F.2d 320, 325 (6th Cir. 1985) (for claims under LMRA § 303, declined to follow earlier precedent which applied state residual statute of limitations and instead applied 3-year statute of limitations for actions for inducement of breach of contract and unlawful interference with a business relationship).[5]

This Court should review the decision of the court of appeals because its decision not only creates confusion in the circuits, but its analysis disregards the fundamental state-law borrowing principles to which this Court has long adhered.

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[5] Respondents cite *C&W Constr. Co. v. Carpenters Local 745*, 687 F. Supp. 1453, 1460 (D. Haw. 1988), to support the proposition of borrowing a residual statute of limitations to claims under § 303 of the LMRA. The court in *C&W* only applied the residual statute of limitations to cases arising prior to this Court's decision in *DelCostello*. *Id.* at 1459. For cases after *DelCostello*, the court said that a six-month federal statute of limitations under the LMRA would apply. *Id.*

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

ROBERT A. SIEGEL
(Counsel of Record)
O'MELVENY & MYERS
400 South Hope Street
Los Angeles, CA 90071
(213) 669-6000

JEFFREY I. KOHN
O'MELVENY & MYERS
153 East 53rd Street
New York, N.Y. 10022
(212) 326-2000

KRIS J. KOSTOLANSKY
ROTHGERBER, APPEL, POWERS & JOHNSON
Suite 3000
One Tabor Center
1200 Seventeenth Street
Denver, CO 80202
(303) 623-9000

Attorneys for Petitioner

Dated: August —, 1992

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel B. Sparr

Civil Action No. 88-S-1997

CHARLES BOWDRY, *et al.*,
Plaintiffs,

v.

UNITED AIR LINES, INC.,
Defendant.

ORDER

[Filed Jan. 31, 1991]

THIS MATTER comes before the Court on Plaintiffs' Motions and Legal Authority for Order Certifying Issues for Immediate Appeal, for Amendment of Previous Orders, and for Stay of Litigation Pending Appeal.

First, Plaintiffs request amendment of this Court's January 18, 1991 Order to reflect that it was a final order of judgment as to Plaintiffs Vannice, Hart, and Howard. Plaintiffs also request certification for immediate appeal of (1) the issue of first hire rights under the Job Preservation Agreement, found at pages 1 through 5 of the Court's Order and (2) the issue of the statute of limitations for claims under the Airline Deregulation Act, found at pages 7 through 9 of the Court's Order.

Pursuant to Fed. R. Civ. P. 54(b), when more than one claim for relief is presented in an action, the court may direct the entry of a final judgment as to one or more

but fewer than all of the parties upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. The Court hereby determines that there is no just reason for delay and directs entry of judgment on the January 18, 1991 Order as to Plaintiffs Vannice, Hart, and Howard.

Next, pursuant to 28 U.S.C. § 1292(b), the Court is of the opinion that its January 18, 1991 Order involves controlling questions of law as to which there are substantial grounds for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation. The Court hereby certifies for immediate appeal: (1) the issue of first hire rights under the Job Preservation Agreement, found at pages 1 through 5 of the Court's Order and (2) the issue of the statute of limitations for claims under the Airline Deregulation Act, found at pages 7 through 9 of the Court's Order.

In light of this certification and in the interests of justice, all proceedings in the district court are hereby STAYED.

DATED at Denver, Colorado, this 31st day of January, 1991.

BY THE COURT:

/s/ Daniel B. Sparr
DANIEL B. SPARR
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 88-S-1997

CHARLES BOWDRY, *et al*,
Plaintiffs,

v.

UNITED AIR LINES, INC.,
Defendant.

AMENDED JUDGMENT

[Filed Feb. 6, 1991]

Pursuant to and in accordance with the Memorandum Opinion and Order signed by the Honorable Daniel B. Sparr on January 18, 1991 and with the Order signed on January 31, 1991 it is

ORDERED that defendant United's motion for partial summary judgment is GRANTED as to Plaintiff, Bob Berger, Paul Hart, James Hartzer, Milton Howard, Rich Kenon, Loren Mach, Glenn Mulline, Norman Rankin, Dane Vannice as to the issue of first hire rights, it is

FURTHER ORDERED that defendants motion for summary judgment against plaintiffs, Dane Vannice, Paul Hart, and Milton Howard is GRANTED and it is

FURTHER ORDERED that judgment of dismissal to enter in favor of the defendant, United Air Lines and against the plaintiffs, Dane Vannice, Paul Hart, Milton Howard, it is

FURTHER ORDERED that this case be and are hereby dismissed as to Dane Vannice, Paul Hart, Milton Howard.

Dated at Denver, Colorado this 6th day of February, 1991.

FOR THE COURT:

JAMES R. MANSPEAKER, Clerk

/s/ Shephen Ehrlich
STEPHEN EHRLICH,
Chief Deputy Clerk